



## DEPARTMENT OF THE TREASURY OFFICE OF PUBLIC AFFAIRS

EMBARGOED UNTIL 10:00 AM  
March 16, 2005

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### **Testimony of Robert Werner, Director Office of Foreign Assets Control U.S. Department of the Treasury**

#### **Before the House Committee on Agriculture**

##### **I. Introduction**

Good morning Chairman Goodlatte; Ranking Member Peterson; and Members of the Committee. I am pleased to have been invited here today to discuss the issue of payments for United States agricultural exports to Cuba.

As you know, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") is responsible for administering and enforcing economic embargoes and sanctions programs, including the embargo of Cuba. In performing its mission, OFAC relies principally on delegations of authority made pursuant to the President's broad powers under the *Trading With the Enemy Act* ("TWEA") and the *International Emergency Economic Powers Act* ("IEEPA") to prohibit or regulate commercial or financial transactions involving specific foreign countries, entities, or individuals. OFAC exercises an array of responsibilities in administering and enforcing numerous economic sanctions and embargo programs, including rulemaking; licensing; compliance-oriented outreach and education; civil penalties; referrals for criminal enforcement actions; the blocking of assets in the United States in which foreign states or persons have an interest; and required recordkeeping and reporting. We also conduct investigations and analysis in preparation for designations and drafting or implementation of new sanctions programs.

In administering and enforcing economic sanctions and embargo programs, OFAC maintains a close working relationship with numerous other federal departments and agencies to ensure that these programs are implemented properly and enforced effectively. Among the agencies OFAC works with outside the Treasury Department are: the Department of State ("State") for foreign policy guidance in promulgating regulations and in considering sensitive license applications; the Department of Commerce ("Commerce") on issues regarding exports and reexports; U.S.

Customs and Border Protection and U.S. Immigration and Customs Enforcement for assistance in the many enforcement matters involving exports, imports, transportation, and travel; the bank regulatory agencies to assure bank compliance with financial restrictions; the Department of Justice on legal issues and matters in litigation; and numerous law enforcement agencies.

## **II. The Cuba Embargo and the *Trade Sanctions Reform and Export Enhancement Act of 2000***

On July 8, 1963, the United States imposed an economic embargo against Cuba in response to hostile actions by the Cuban government. The embargo was implemented by OFAC through promulgation of the *Cuban Assets Control Regulations* (31 CFR Part 515). Cuba is also presently listed as a state sponsor of terrorism by the Department of State.

Most relevant to today's hearing, however, is the fact that in 2000, *Congress enacted the Trade Sanctions Reform and Export Enhancement Act of 2000* ("TSRA"). Among other things, this legislation directed the adjustment of restrictions on the export of agricultural commodities to countries subject to U.S. unilateral controls.

In order to implement TSRA, on July 21, 2001, OFAC published amendments to the Cuban Assets Control Regulations, as well as amendments to the Sudanese Sanctions Regulations (31 CFR Part 538), the *Libyan Sanctions Regulations* (31 CFR Part 550), and the *Iranian Transactions Regulations* (31 CFR Part 560). OFAC believes that these amendments, which were produced in consultation with other government agencies, are consistent with both the statutory language of TSRA and the intent of its drafters. We also believe that the amendments provide exporters with an efficient and expedited process for engaging in authorized exports of agricultural commodities.

With respect to Cuba, OFAC's implementation of TSRA focused on methods of payment for agricultural exports licensed by the Commerce Department.

The *Cuban Assets Control Regulations*, prior to the passage of TSRA, already provided a general license for transactions, including payments, incident to exportations that were licensed or otherwise authorized by the Commerce Department. This meant that an exporter who had received a Commerce license to export goods to Cuba did not need to seek further authorization from OFAC. This provision, found in §515.533 of the regulations, was amended, however, in order to implement the financing restrictions contained in TSRA. OFAC also amended §515.533 to clarify that reexports of U.S.-origin items by persons subject to the jurisdiction of the United States were also covered by the general license (§515.533(a)) and that specific licenses would be issued for travel engaged in for the purpose of arranging licensed sales (§515.533(e)).

## **III. Financing Exports to Cuba**

Mirroring the language in the statute, OFAC's 2001 amendment to §515.533 provides that licensed agricultural sales are authorized as long as they are financed by payment of cash in advance or through financing by a third country financial institution. With respect to third

country financing, the regulation permits U.S. financial institutions to confirm or advise such financing. These provisions are reflected in §515.533(a)(2) and provide specifically that:

Only the following payment or financing terms may be used:

- (i) Payment of cash in advance;
- (ii) For authorized sales of agricultural items, financing by a banking institution located in a third country provided the banking institution is not a designated national, United States citizen, United States permanent resident alien, or an entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches). Such financing may be confirmed or advised by a United States banking institution.

It is important to emphasize that financing through letters of credit, by a non-target bank in a third country, has always been authorized under these provisions. That is as true today as it was when the TSRA amendments were introduced. Letters of credit are a recognized method of payment in international trade, including agriculture. When a bank issues a letter of credit, it is creating its own obligation to pay a seller, as long as the seller submits documents in accordance with the terms of the letter of credit. Such financing provides a “buffer” between the buyer and the seller with a bank substituting its name and credit for that of the buyer. In the case of OFAC’s regulations, the payment to the U.S. exporter may even be guaranteed and expedited by a U.S. bank based on a credit facility with a legitimate non-target foreign bank. In terms of accommodating sales contracts, goods are often shipped before documents can be presented in letter of credit transactions; payment from a third country bank may well be received after shipment.

#### **IV. Interpreting Section 515.533(a)(2)(i)**

The term “payment of cash in advance” found in §515.533(a)(2)(i) is not defined in either TSRA, or its legislative history. Similarly, OFAC’s regulations do not contain a separate definition of this term. OFAC’s research indicates, however, that the commonly understood meaning of the term in the international trade finance community is that full payment for the goods is received by the exporter before the goods are shipped. And this, as will be discussed further, is the construction that OFAC applies to this term.

A complicating factor here is that the general license provisions of §515.533 made monitoring payments for agricultural shipments to Cuba difficult since, under a general license, the parties involved in the transaction had no obligation to file reports with OFAC. It is now apparent that this allowed a discrepancy to develop between OFAC’s expectation of how cash in advance payments would be processed and how many exporters actually implemented this financing option.

In 2003, however, at the request of the State Department, OFAC did send out a survey to a number of U.S. exporters, asking them to certify that they were in compliance with the payment provisions of §515.533. Virtually all of the letters received in response to OFAC’s inquiry

merely certified that the exporters were in compliance with the “payment of cash in advance” provisions of §515.533.

A recent review of these responses has revealed that there were a handful of letters that indicated that, despite the commonly understood meaning of “payment of cash in advance” as described above, some exporters were interpreting the term to allow for the shipping of goods to Cuba provided cash payment was received prior to delivery of title to the goods. This method of payment more closely resembles a financing mechanism known in the international trade as documentary collection. A further review of these responses was not conducted.

## **V. Clarification of Section 515.533(a)(2)(i)**

In the summer of 2004, OFAC’s Compliance Division began receiving specific inquiries from U.S. financial institutions seeking guidance on the question of whether or not the shipment of goods prior to receipt of payment by U.S. exporters was permitted under §515.533(a)(2)(i).

OFAC is not certain what triggered the inquiries. We believe it may have been an article concerning agricultural trade with Cuba and methods of payment, which was published in late July (*Economic Eye on Cuba*, 26 July-15 August 2004). OFAC Compliance actually referred two of these cases to OFAC’s Enforcement Division for investigation and notified senior OFAC management about the issue. However, OFAC found itself in the position of being unable to provide definitive guidance and began extensive consultations within Treasury and with other executive branch agencies on the interpretation of the term “payment of cash in advance.” These consultations took a number of months.

As an interim step, in order to mitigate any disruption of licensed agricultural exports to Cuba, OFAC adopted a temporary policy of issuing specific licenses permitting cash payment against documents to exporters whose transactions occurred while guidance was pending. OFAC created the interim specific licensing policy to ensure that U.S. exporters received payment for goods already shipped to Cuba and the Cuban people did not see a disruption in agricultural shipments to the island.

On February 22, 2005, following the completion of the interagency consultations, OFAC announced a clarification of the term “payment of cash in advance,” as set forth in §515.533(a)(2)(i), that conforms to the common understanding of the term in international trade finance described above. Specifically, OFAC confirmed that “payment of cash in advance” with regard to Commerce-licensed shipments of agricultural items to Cuba means payment of cash prior to shipment of goods. This clarification of “payment of cash in advance” had no effect on payments financed through letters of credit under §515.533(a)(2)(ii).

## **VI. Transition Period**

The final rule on this payment policy went into effect on the day it was announced. In order to provide a transition period, the language in the final rule provides a 30-day window (March 24, 2005) for exporters to engage in transactions under financing terms resembling “cash against documents,” but requires payment for such transactions to be completed within that 30-day

period. Exporters will continue to need to obtain authorization from Commerce to ship the goods.

After the 30-day “cash against documents” financing period ends, any transactions under financing terms resembling “cash against documents” will be prohibited. To the extent an exporter has an existing contract that requires “cash against documents” financing transactions to occur after the 30-day period, the payment terms of that contract would need to be renegotiated to allow for cash in advance of shipment or a letter of credit issued by a third-country bank. It is consistent with the President's authority and with OFAC’s past practice in other sanctions programs, such as the sanctions against Iran and Sudan, to provide for a limited grace period for export transactions under pre-existing contracts.

## **VII. Conclusion**

OFAC believes the clarification announced on February 22, 2005, implements TSRA in a manner that is most consistent with the plain meaning of the statutory language.

It is also important to emphasize that the provisions allowing for payment through letters of credit issued by third country banks remain unaffected by the clarification of “cash payment in advance.”

Thank you for the opportunity to address the Committee on this important topic.